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HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 591, 592, 593, 594, 595, 596 and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

*Petitioners,*

*vs.*

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

*Respondents.*

## JOINT PETITION FOR REHEARING OF DENIAL OF CERTIORARI PETITIONS.

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IN THE

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MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

*Petitioners,*

*vs.*

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

*Respondents.*

## JOINT PETITION FOR REHEARING OF DENIAL OF CERTIORARI PETITIONS.

*To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioners respectfully request a rehearing by the United States Supreme Court of their respective petitions for certiorari, filed February 9, 1953, all of which were prior to the publication of *Western Pacific R. Corp. v. Western Pacific R. Co.*, Nos. 150 and 160, October Term, 1952, decided April 6, 1953, in which the United States Supreme Court reversed the Court of Appeals for the Ninth Circuit for refusing to consider a petition for

hearing *en banc,* and remanded to the Court of Appeals for consideration of such *en banc* petitions, in the light of the United States Supreme Court's decision of said case.

## Question Presented.

Whether an order of a single division of the Court of Appeals denying petitioners' rehearing *en banc,* sought because of direct conflicts between several different panels of the same Court of Appeals in the same, and other litigation, should be reversed so that the whole Court of Appeals may consider the question of hearing *en banc* in the light of the United States Supreme Court's subsequent decision of *Western Pac. R. Corp. v. Western Pac. R. Co., supra,* decided April 6, 1953.

## Statement.

Petitioners' timely-filed petitions for hearing *en banc* were denied by orders of the same panel of the Court of Appeals which had heard the appeals [Apl. No. 12511, R. 11685, and Apl. No. 12591, R. 1036]. The denial of petitions for hearing *en banc* were made at a time[1] when the Court of Appeals considered itself bound by its opinion in *Western Pac. R. Corp. v. Western Pac. R. Co.,* rendered July 9, 1952, reported in 197 F. 2d at 1013, and reversed by the United States Supreme Court April 6, 1953, after filing of petitioners' certiorari petitions herein.

In reliance on such opinions, a single division of the Court of Appeals in both cases denied petitioners' application for *en banc* rehearing without consideration by the whole Court [see R. 11685 in Apl. No. 12511, and R. 1036 in Apl. No. 12591].

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[1]As to Appeal No. 12511, November 13, 1952, and as to Appeal No. 12591, December 17, 1952.

## A. En Banc Rehearing by the Court of Appeals Cannot Be Denied by a Single Division.

### 1. En Banc Rehearing Was Required by Conflicts in the Court of Appeals.

There are exactly contrary positions between the panel deciding the two appeals from which certiorari is herein sought and previous decisions of other panels of the same Court of Appeals in this same litigation.

In September, 1946, Circuit Justice William E. Orr wrote the opinion of the statutory three-judge court, found in 68 Fed. Supp. 418, and reversed by the United States Supreme Court in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030.

In December, 1947, a panel of the Court of Appeals, composed of Justices Clifton Mathews, Albert Lee Stephens, and William E. Orr (Justice Orr later withdrew and was replaced by Justice William Healy), after filing of printed briefs and full oral argument, and in reliance on the mandate of the United States Supreme Court in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, denied stays of execution then sought by the present respondents.

Thereafter the appeals in which such proceedings were had were dismissed.

In February, 1950, present respondents sought writs of prohibition, mandamus or other appropriate writs from the Court of Appeals to prohibit and prevent District Judge Peirson M. Hall from any further proceedings in the consolidated cases in the Court below. The applications for such writs of prohibition, mandamus, etc., were considered by panels of the Court of Appeals originally

composed of Circuit Justices Clifton Mathews, Homer T. Bone, and Walter L. Pope, and later of Justices Clifton Mathews, William Healy, and Homer T. Bone. Such applications of respondents for writs of prohibition, mandamus, etc., were denied by said panels of said Court of Appeals, without opinion.

*Neither Justices Mathews, nor Pope, nor Orr, who had previously participated in conflicting rulings in these same questions by this same Court of Appeals was accorded any opportunity to consider the opinions of such different panel, either en banc or otherwise.*

Such consideration was prevented by the application of the opinion of the Court of Appeals in *Western Pac. R. Corp. v. Western Pac. R. Co.*, 197 F. 2d 1013, now reversed by the United States Supreme Court.

**2. Conflict in Decisions Between Different Panels of the Same Court of Appeals on the Same Questions of Law.**

In the opinion in 196 F. 2d 336, Appeal No. 12511, filed April 2, 1952, the panel of the Court of Appeals composed of Justices Stephens, Healy and Bone, held that no action could be filed in the District Court to be held by the Court pending completion of administrative procedures, and said:

> "The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. . . ."

but in *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949), a different panel of the same Court of Appeals composed of Justices Mathews and Orr, and District Judge James Alger Fee, in deciding the same question, held the District Court—

> ". . . should have held the cause in abeyance until the board made a primary determination . . ."

**3. Important Jurisdictional Questions Should Have Been Considered by the Court of Appeals En Banc.**

Because of the conflict between the various panels of the Court of Appeals which have previously (in 1947 and 1950), made decisions on jurisdiction of the District Court in conflict with, and contrary to, the 1952 opinions[2] (the subject of petitioners' present certiorari applications), and because of the conflict between the other panels of the same Court of Appeals (on the same questions of jurisdiction of the District Courts), rendered in other litigation,[3] both the litigants and the United States Supreme Court should have been accorded the benefit of a hearing *en banc.*

By such hearing, the 200 pages of opinions of the Court of Appeals and the large number of questions presented in petitioners' certiorari applications, could have been drastically reduced in number, so that a single simple issue could have been presented to the United States Supreme Court for its authoritative decision.

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[2]*Home Loan Bank Board, et al. v. Mallonee, et al.,* 196 F. 2d 336; *Fahey, et al. v. O'Melveny & Myers, et al.,* 200 F. 2d 420.

[3]*Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949).

The Fifth Circuit in *United States v. Sentinel Insurance,* 178 F. 2d 217 (1949), considered appeals *en banc* because of important jurisdictional questions presented by interpleader proceedings involving Collector of Internal Revenue, federal receivers, and claimants, diversity of whose citizenship was doubtful.

**B. Rehearing en Banc Not Discussed in Original Certiorari Petitions.**

Petitioners did not mention in their original petitions for certiorari the denial by the Court of Appeals for the Ninth Circuit of their petitions for rehearing *en banc,* because the decision of this Honorable United States Supreme Court in *Western Pacific R. Corp. v. Western Pacific R. Co.,* Nos. 150 and 160, October Term, 1952 (decided April 6, 1953), was then not yet announced.

Petitioners therefore did not desire to burden their several petitions with yet another point. However, in *Bradley Mining Co. v. Boice* (No. 648, Oct. Term, 1951, decided April 13, 1953), denial of rehearing *en banc* by the Court of Appeals was brought to the attention of the Supreme Court for the first time in petitions for rehearing by the Supreme Court after denial of certiorari.[4]

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[4]In *White v. Texas,* 310 U. S. 530, 84 L. Ed. 1342, rehearing after denial of certiorari was granted because of a subsequent decision of the Supreme Court. In *Schriber-Schroth v. Cleveland Trust,* 305 U. S. 47, 83 L. Ed. 34, after denial of certiorari, rehearing was granted because of new grounds shown for the first time in rehearing petitions.

## Conclusion.

Following its decision in *Western Pacific R. Corp. v. Western Pacific R. Co.* (Nos. 150 and 160, Oct. Term, 1952, decided April 6, 1953), the United States Supreme Court in *Bradley Mining Co. v. Boice* (No. 648, Oct. Term, 1951, decided April 13, 1953), vacated its order denying certiorari, granted the petitions for writs of certiorari, vacated the orders of the division of the Court of Appeals denying petitions for rehearing *en banc,* and remanded to the Court of Appeals for further proceedings in the light of *Western Pacific R. Corp. v. Western Pacific R. Co., supra.*

The United States Supreme Court also, in *Banks Warehouses, Inc. v. Watt* (No. 266, Oct. Term, 1952, decided April 13, 1953), granted certiorari petitions, vacated the order of the division of the Court of Appeals denying petitions for rehearing *en banc,* and remanded to the Court of Appeals for further proceedings in the light of *Western Pacific R. Corp. v. Western Pacific R. Co., supra.*

Petitioners respectfully suggest that similar treatment be accorded their petitions for certiorari so that the conflicts between the previous decisions of the Court of Appeals in this same litigation, in denying writs of prohibition in 1950, denying stay of proceedings, and dismissing previous appeals in 1947, and the 1952 opinions that the entire litigation has at all times been:

> ". . . beyond the jurisdiction of the District Court over the subject matter . . ."

may be reconciled or clarified by hearing *en banc*, wherein the differing views of *six of the seven members of the said Court of Appeals in this same litigation may be jointly considered by all of them en banc.*

Respectfully submitted,

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RAYMOND TREMAINE,
*Attorney for Petitioner Robert H. Wallis.*

EMMETT E. DOHERTY,
*Attorney for Petitioner John D. Willhoit.*

**Certificate of Counsel.**

Each of the undersigned hereby respectively certify that the foregoing joint petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of the United States Supreme Court.

CHARLES K. CHAPMAN,
WYCKOFF WESTOVER,
W. I. GILBERT, JR.,
LYMAN B. SUTTER,
F. HENRY NE CASEK,
RAYMOND TREMAINE,
EMMETT E. DOHERTY.

# In the Supreme Court of the United States

OCTOBER TERM, 1952

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Nos. 591, 592, 593, 594, 595, 596, and 658

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MALLONEE, BUCKLIN, AND FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, AND LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., PETITIONERS

*v.*

FAHEY, AMMANN, AS CONSERVATOR, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL., AND SIX RELATED CASES.

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO THE JOINT PETITION FOR REHEARING

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The respondents oppose the joint petition for rehearing of the denial of petitioners' petitions for writs of certiorari.

1. Petitioners seek to obtain a rehearing on the basis of the recent decisions of this Court in *Western Pacific Rd. Corp.* v. *Western Pacific*



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*Rd. Co.*, 345 U. S. 247, *Bradley Mining Co.* v. *Boice*, 345 U. S. 932, and *William H. Banks Warehouses, Inc.* v. *Watt*, 345 U. S. 932. In those instances this Court vacated judgments of the Court of Appeals for the Ninth Circuit and remanded them for further proceedings on the ground that the court below had not properly disposed of petitions for rehearing *en banc*, expressly addressed to the full Court of Appeals, presenting a full and explicit argument why a rehearing *en banc* was necessary in the particular circumstances.[1]

The instant petition for rehearing is not predicated on comparable serious petitions for rehearing *en banc* in the court below. To the extent that petitions for rehearing *en banc* were filed at all in the Court of Appeals,[2] they were ordinary petitions for rehearing to which the words *en banc* were apparently added as a matter of routine.[3]

That petitioners did not seriously ask for a hearing *en banc* in the Court of Appeals appears

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[1] *Western Pacific Railroad Case*, No. 150, R. 2263; *Banks Warehouses, Inc.* v. *Watt*, No. 266, R. 687–688, 695; *Bradley Mining Co.* v. *Boice*, No. 648, 1951 Term, Petition for Rehearing, p. 3, and see dissenting opinion of Pope, J., 198 F. 2d 790, 792.

[2] See *infra*, pp. 5–8.

[3] In *Western Pacific R. R. Corp.* v. *Western Pacific R. Co.*, 197 F. 2d 994 (C. A. 9), Healy, J., pointed out (at 1013, fn. 1) that "it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges."

from the circumstance that the request for the hearing was made in the alternative, using such terms as "either in bank or before the same panel," or "in banc or otherwise." Moreover, these alternative requests were contained only in the formal Introductions and Conclusions. The body of none of the petitions for rehearing *en banc* contained any explicit discussion directed to reasons why a rehearing *en banc* was desirable or necessary. The argument made to this Court in the instant petition that the decision below created an intra-circuit conflict was never addressed to the Court of Appeals (cf. *Magnum Co.* v. *Coty,* 262 U. S. 159, 163).[4]

2. Moreover, the procedure followed by the court below in disposing of the petitions for rehearing *en banc* was in substantial compliance with the requirements laid down in the *Western Pacific Railroad Case,* 345 U. S. 247, 260–263. In *Western Pacific R. R. Corp.* v. *Western Pacific R. Co.,* 197 F. 2d 994, 1013–1016 (C. A. 9), decided on July 9, 1952, the Court of Appeals

[4] Petitioners claim that the decisions below are in conflict with decision of other panels of the court of appeals denying stays of execution and writs of prohibition and mandamus. The issues presented on such applications, of course, are quite different from those involved in an appeal on the merits. The consistency between the instant decisions and the earlier ones appears from the circumstance that Judge Healy participated in the denials of stay of execution, and Judges Healy and Bone, both members of the panel below, denied the petitions for writs of prohibition and mandamus (Joint Petition for Rehearing, pp. 3–4).

had adopted rules to govern future applications for petitions for rehearing *en banc*. These rules, adopted in the exercise of the court's "uncontrolled discretion$" (197 F. 2d at 1016), established a procedure in which the full court delegated the responsibility for the initiation of the *en banc* power to the division to which the case was assigned for determination; the rules do not deny the litigants the opportunity to suggest to the panel of the Court of Appeals the desirability of a rehearing *en banc*. Acting in accordance with these rules, the panel in the instant case, according to the recitals in the orders (*infra*, p. 9 and p. 10), considered the request for rehearing *en banc* separately from the issue whether rehearing should be granted at all (cf. 345 U. S. at 262). The record thus indicates that there was consideration by the panel of the petitions for rehearing *en banc*, and that the panel denied the petitions on the merits in the exercise of the powers delegated to it by the full Court of Appeals. The proceedings in the instant case do not disclose any of the ambiguities present in the *Western Pacific Railroad Case*, 345 U. S. 247, 263, 267, or in *Bradley Mining Co.* v. *Boice*, 198 F. 2d 790 (C. A. 9), vacated, 345 U. S. 932, in which the panel denied the second petition for rehearing *en banc* possibly not on the merits but on the jurisdictional ground that petitioner "has had its appeal and its op-

portunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time" (at 791).

In the instant case, petitioners' perfunctory and unsupported petitions for rehearing *en banc,* in the alternative, were considered and denied on the merits by a panel to which the authority to make this decision had been delegated. We submit that the instant petition does not present any of the reasons which caused the vacating of the decisions in the *Western Pacific Railroad, Bradley Mining,* and *Banks Warehouses* cases.[5]

3. To this point, we have assumed that petitions for rehearing *en banc* were filed by all nine petitioners in the instant case.[6] This, however, is not the case. Petitioners seek review of two judgments in the Court of Appeals, Nos. 12511 (the *Long Beach* case) and 12591 (the *Los Angeles* case). If the petitioners for rehearing in this Court, each of whom complains of the failure of the court below properly to dispose of his petition for rehearing *en banc,* had all filed such petitions

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[5] In the last case, the petition for rehearing *en banc* was denied on June 19, 1952 (see 196 F. 2d 1018), *i. e.*, prior to the delegation of authority to the panel to pass on such petitions.

[6] The joint petition for rehearing has been filed on behalf of Long Beach, Mallonee, *et al.* (Shareholders), Utley, Wilmington, Title Service Co., Home Investment Co., Turner, Wallis, and Willhoit (Pet. for Rehearing, p. 8). W. I. Gilbert, petitioner in No. 592, has not joined the petition for rehearing.

in the Court of Appeals, eighteen petitions for rehearing *en banc* would have been filed. Actually, the orders denying the petitioners for rehearing and rehearing *en banc* (*infra,* pp. 9–10) disclose that only two petitions for rehearing *en banc* were filed in the Court of Appeals in No. 12511, *viz,* by Long Beach and Home Investment Co., and three in No. 12591, *viz,* by Long Beach, Mallonee, *et al.,* and Utley.[7]

Since the claim that the court below improperly disposed of their petitions for rehearing *en banc* is the only ground upon which petitioners base

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[7] The recitals of the Court of Appeals' orders have been checked against the petitions for rehearing on file with the Court of Appeals for the Ninth Circuit. The files indicate that the following petitioners did not file any petitions for rehearing at all in the following cases:

In No. 12511: Wilmington, Gilbert, Utley, Turner, and Willhoit.

In No. 12591: Home Investment Co., Wallis, Turner, Title Service, and Willhoit.

Petitions for rehearing but not for rehearing *en banc* were filed as follows:

In No. 12511: Mallonee, Bucklin, and Fergus (Shareholders' Protective Committee), Wallis, Title Service Company.

In No. 12591: Wilmington (W. I. Gilbert, Jr.)

The absence of serious consideration given by petitioners to their requests for rehearing *en banc* appears from the circumstance that the same attorney who prepared the rehearing petitions for Wilmington and Utley added the words, "*en banc* or otherwise" to the conclusion of the Utley petition but omitted them in the Wilmington petition. And the request of Mallonee, *et al.* for a rehearing *en banc* in No. 12591 appears to be predicated only on the fortuitous circumstance that in No. 12591 they joined the Long Beach petition for rehearing but submitted a separate one in No. 12511.

their joint petition for rehearing in this Court, the instant petition for rehearing is unsupported *in fact* as to the following petitioners:

*No. 591,* to the extent that Mallonee, Bucklin and Fergus (Shareholders' Protective Committee) seek review of the judgment of the Court of Appeals in No. 12511 (Long Beach case);[8]

*No. 592,* in its totality;[9]

*No. 593,* to the extent that petitioner seeks review of the judgment of the Court of Appeals in No. 12591 (Los Angeles case);[10]

*No. 594,* to the extent that petitioner seeks review of the judgment of the Court of Appeals in No. 12511 (Long Beach case);[11]

*No. 595,* in its totality;[12]

---

[8] Mallonee, et al. (Shareholders' Protective Committee), petitioner in No. 591, did not ask for rehearing *en banc* in No. 12511 (Long Beach case).

[9] Wilmington, one of the petitioners in No. 592, did not file a petition for rehearing in No. 12511 (Long Beach case) and did not ask for rehearing *en banc* in No. 12591 (Los Angeles case). Gilbert, the other petitioner in No. 592, does not join the joint petition for rehearing.

[10] Home Investment Co., petitioner in No. 593, did not file a petition for rehearing in No. 12591 (Los Angeles case).

[11] Utley, petitioner in No. 594, did not file a petition for rehearing in No. 12511 (Long Beach case).

[12] Wallis, one of the petitioners in No. 595, did not ask for rehearing *en banc* in No. 12511 (Long Beach case) and did not file a petition for rehearing in No. 12591 (Los Angeles case). Turner, the other petitioner in No. 595, did not file any petition for rehearing.

*No. 596,* in its totality;[13]
*No. 658,* in its totality.[14]

CONCLUSION

It is respectfully submitted that the petition for a rehearing should be denied.

ROBERT L. STERN,
*Acting Solicitor General.*
SYLVESTER HOFFMANN,
*Attorneys for Respondents.*

MAY 1953.

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[13] Title Service Co., petitioner in No. 596, did not ask for rehearing *en banc* in No. 12511 (Long Beach case) and did not file a petition for rehearing in No. 12591 (Los Angeles case).

[14] Willhoit, petitioner in No. 658, did not file any petition for rehearing.

# APPENDIX

[12591 R. 1036]

## UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title of Cause]

EXCERPT FROM PROCEEDINGS OF WEDNESDAY, DECEMBER 17, 1952

Before: STEPHENS, HEALY and BONE, *Circuit Judges.*

ORDER DENYING PETITION FOR REHEARING, ETC.

Upon consideration of the petitions of the appellees Mallonee, et al. (Shareholders Protective Committee), and Long Beach Federal Savings and Loan Association, and the petition of appellee Ernest R. Utley, Receiver, for a rehearing en banc, filed Dec. 6, 1952, It Is Ordered that said petitions be, and they hereby are denied.

Upon consideration of the petitions, filed December 6, 1952, and within time allowed therefor by rule of court, by appellees Mallonee, et al., and Long Beach Federal Savings & Loan Association, by First Federal Savings & Loan Association of Wilmington and W. I. Gilbert, Jr., and by Ernest R. Utley, Receiver, for a rehearing of above cause, It Is Ordered that said petitions be, and they hereby are denied.

It Is Further Ordered that the mandate of this court in the above-entitled cause be, and hereby is stayed to and including January 31, 1953.

[12511 R. 11684]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title of Cause]

EXCERPT FROM PROCEEDINGS OF THURSDAY, NOVEMBER 13, 1952

Before: STEPHENS, HEALY and BONE, *Circui Judges.*

ORDER DENYING PETITIONS FOR REHEARING

Upon consideration of the Petitions of Th Long Beach Federal Savings & Loan Associatio and of the appellees Home Investment Compan of Long Beach, et al., intervenors, for a rehea ing en banc, filed May 1, 1952, It Is Ordere that the said petitions be, and hereby are denied.

It Is Further Ordered that the petitions o appellees, The Shareholders (as a class cause) o the Long Beach Federal Savings & Loan Associa tion; The Shareholders Protective Committee and Robert H. Wallis; and Title Service Com pany, filed May 1, be, and each of them hereb is denied.

It Is Further Ordered that the mandate o this court in the above-entitled cause be, an hereby is stayed to and including December 3( 1952.

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JUN 3 1953
HAROLD B. WILLEY, C

IN THE

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*Petitioners,*

*vs.*

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

*Respondents.*

## PETITIONERS' JOINT REPLY TO OPPOSITION TO REHEARING.

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| Western Pac. R. Corp. v. Western Pac. R. Co., 345 U. S. 247 | 2, 3, 6, 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.
Nos. 591, 592, 593, 594, 595, 596 and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

*Petitioners,*

*vs.*

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

*Respondents.*

## PETITIONERS' JOINT REPLY TO OPPOSITION TO REHEARING.

### I.

### Petitions for Rehearing En Banc Before Whole Court of Appeals Were "Serious" and Meritorious, Yet Erroneously Denied by a Single Division.

Respondents' opposition asserts that petitioners did not "seriously" seek rehearing *en banc* before the Court of Appeals. But the single panel of the Court of Appeals (which alone denied petitions for rehearing *en banc* by the entire Court), thought such petitions sufficiently "serious" to

devote thereto the opening paragraphs of its Order Denying Petitions For Rehearing to both in Appeals Nos. 12511 and 12591. Each order contains the language:

> "Before: Stephens, Healy and Bone, Circuit Judges.
>
> ". . .
>
> "Upon consideration of the Petitions, . . . for a rehearing *en banc,* . . . It Is Ordered that said petitions be, and hereby are denied." [R. 11684, Apl. 12511.]

The "consideration" referred to, however, was that of the single panel of three judges, *not the whole court.*

Among the subject heads in petitions for rehearing *en banc* were:

> **"Conflicts Between Two Opinions of Court of Appeals in Same Cases."**

The whole Court of Appeals to whom the petitions for rehearing *en banc* were made, never passed on them, on the merits, or otherwise.

That such denial was erroneous cannot be disputed after the reversals only last month by the U. S. Supreme Court in three separate cases[1] of similar erroneous refusal of this same Court of Appeals to consider applications for rehearing *en banc.*

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[1]*Western Pac. R. Corp. v. Western Pac. R. Co.,* 345 U. S. 247; *Bradley Mining Co. v. Boice,* 345 U. S. 932, and *Banks Warehouses, Inc. v. Watt,* 345 U. S. 932.

## II.

## Petitions for Rehearing En Banc Were Erroneously Denied in Reliance on Now-Reversed Court of Appeals' Decision.

When our petitions for rehearing *en banc* were denied by a single division of the Court of Appeals, the Court followed its prior opinion:

> "From this time forward petitions, if any, for rehearing *en banc* in cases determined by divisions of three judges will be considered and *disposed of* by the latter *as ordinary petitions for rehearing.*" (Emphasis added.)

(*Western Pac. etc.,* 197 F. 2d 1013 at 1016, reversed by the U. S. Supreme Court in *Western Pac. etc.,* 345 U. S. 247.)

By such language, consideration of the demonstrated need for *en banc* rehearings in our cases was prohibited and prevented.

Respondents claim the whole Court of Appeals "delegated responsibility" to the single panel. But the quoted language prevents consideration of the merits of a rehearing *en banc.* The petitions for such rehearing:

> ". . . will be considered and disposed of . . . as *ordinary petitions for rehearing.*" (Emphasis added.)

This is not delegation; it is prohibition. So long as this opinion controlled, no rehearing *en banc* could ever be granted.

## III.

## Intra-circuit Conflicts Were Presented to Court of Appeals in Petitions for Rehearing En Banc, Which Were Denied.

The intra-circuit conflicts mentioned in petitioners' joint petition for rehearing[2] of denial of certiorari petitions were, together with many *other* intra-circuit conflicts, fully set forth in the various petitions for rehearing *en banc,* filed in the Court of Appeals.

One of the points of the Joint Petition by Long Beach Association and Mallonee, *et al.,* as its Shareholders' Protective Committee, for rehearing *en banc* in Appeal No. 12591, was entitled:

> **"Conflicts Between Two Opinions of Court of Appeals in Same Cases."**

Further itemization of conflicting decisions of the same Court of Appeals, cited and discussed in the various petitions for rehearing *en banc,* would only unduly lengthen this reply.

## IV.

## The Right to Consideration of Petitions for Rehearing En Banc Is Not Lost by Failure of Other Parties to so Petition.

Respondents seem, by Point III of their opposition, to confuse the *separate* rights of *separate* appellees in TWO unconsolidated appeals, Nos. 12511 and 12591 in the Court below.

Many of petitioners were parties to *one* only of the *two* unconsolidated appeals.

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[2]Filed in U. S. Supreme Court May 18, 1953.

Other petitioners were never parties to either, but sought to protect in the U. S. Supreme Court their rights decided by the Court of Appeals in their absence.

Failure of one, or more, appellees to seek *en banc* rehearing, can in no way prejudice or deny the rights of those petitioners who did file petitions for rehearing *en banc* in the Court of Appeals. Nor can such failure, if any, on the part of one appellee, justify the erroneous denial of other petitioners' right to consideration *on the merits by the whole Court* of Appeals of their timely-filed petitions for rehearing *en banc.*

## V.

## All Petitioners Have Now Applied to Court of Appeals for Rehearing En Banc.

The inaccuracies of respondents' Point III would require many pages to refute. Most of petitioners, accused by respondents of having failed to file petitions for rehearing, or petitions for rehearing *en banc,* in the Court of Appeals, were parties to one, but not to both, such appeals, and could therefore petition only in one appeal.

Petitioners do not wish to burden the U. S. Supreme Court with all of the complexities of who, among them, were parties appellee to the two unconsolidated appeals in the Court below (Nos. 12511 and 12591), and who did, and did not, petition for either, or both, rehearing, or rehearing *en banc,* by the entire Court of Appeals.

There were a total of eight such petitions in both cases. Some were joint, others separate.

Suffice to say that all petitioners who were overawed by the now-reversed decision of the Court of Appeals in *Western Pac. etc.* (197 F. 2d 1013), and therefore did

not file petitions for *en banc* rehearing, have now dispatched their joint "Petition for Leave to File Motions for Orders: 1. To Vacate Order Denying Appellees' Petitions for Rehearing *En Banc,* and 2. To Permit Filing of Petitions for Rehearing *En Banc* by Appellees who did not Previously so File" to the Clerk of that Court, at San Francisco, California.

All petitioners joined in the joint petition for rehearing of denial of certiorari petitions filed by them in the U. S. Supreme Court on May 18, 1953, after the decision by this Court of *Western Pac. R. Corp. v. Western Pac. R. Co.,* since reported in 345 U. S. 247, and *Bradley Mining Co. v. Boice,* 345 U. S. 932, and *Banks Warehouses, Inc. v. Watt,* 345 U. S. 932, so as to present a single, simple issue to the U. S. Supreme Court.

All petitioners' rights were adversely affected by the now-reversed Court of Appeals' decision of *Western Pac. R. Co.* (197 F. 2d 1013), either by express denial (by a single panel of that Court) of petitions for rehearing *en banc,* or by the effect of the now-reversed decision deterring other petitioners from themselves seeking rehearing *en banc,* from the Court of Appeals.

**Conclusion.**

The full evils of the now-reversed Court of Appeals' decision of *Western Pac. Co., supra,* can be remedied only by the U. S. Supreme Court in our cases,[3] vacating its orders denying certiorari, granting the respective petitions for writs of certiorari, vacating the orders of the division of the Court of Appeals denying petitions for rehearing

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[3]As it did in *Bradley Mining Co. v. Boice,* 345 U. S. 932.

*en banc,* and remanding to the Court of Appeals for further proceedings in the light of the U. S. Supreme Court's three decisions of *Western Pac. R. Corp., supra, Bradley Mining Co. v. Boice, supra,* and *Banks Warehouses v. Watt, supra,* with leave to those petitioners, who did not previously file, to now file their petitions for rehearing *en banc,* and for the Court of Appeals to consider such petitions in the light of the three said U. S. Supreme Court decisions.

Respectfully submitted,

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